IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. [redacted] 824

PATHFINDER PETROLEUM COMPANY, a corporation,

Petitioner,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

WALTER O. SCHELL,
1212 Bartlett Building, Los Angeles 14, California,
Attorney for Defendant and Respondent.

GERALD F. H. DELAMER,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED

CASES.

STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 845.

PATHFINDER PETROLEUM COMPANY, a corporation,
Petitioner,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan F. Stone, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States, Respondent Respectfully Shows:

I.
Statement of Facts.

(a) GENERAL.

Petitioner was engaged in the business of both manufacturing and selling gasoline and of purchasing and reselling gasoline. Its first month of full operation was January, 1940 [R. 195, 207, 223]. After this month, its cost of production of the gasoline it manufactured remained practically constant [R. 68, 175].

Respondent introduced in evidence as its Exhibits "B," "C" and "D" [R. 125-127, 343, 346, 347], certain graphs illustrating the prices received by petitioner and its profits or losses. These were constructed from the figures furnished by petitioner's own auditor-witness [R. 68, 258-261, 273-274, 344-345].

Exhibit "B" shows that prices rose steadily for the first five months of the year; that they dropped in June to below the January level and that they continued downward in July and August.

Exhibit "C" shows the fluctuations in profits or loss, with and without depreciation being taken into consideration.

Exhibit "D" shows a comparison of the prices received by petitioner with its profits or losses. It shows that the latter varied almost directly with the former.

On August 31st the fire occurred causing a three month suspension of petitioner's manufacturing business (Petition, p. 2).

Exhibit "B" shows that a slight rise in prices occurred in September and October over those of August but that they did not reach the July level. November was the lowest month of the entire year. In December, that is the month following the suspension period, prices again rose very slightly over the November prices but did not reach those of September or October.

The average prices for these periods were as follows:

First 5 months	6.787¢ per gal.
June, July and August	6.203¢ " "
Suspension period (Sept., Oct. & Nov.)	6.084¢ " "
December	6.033¢ " "

Respondent's policy was not a fire insurance policy covering damage caused by fire. Petitioner had such a policy in another company which paid the fire loss [R. 215]. Respondent's policy did not cover any loss sustained by plaintiff as the result of the fire, excepting in so far as such loss consisted of net profits and certain fixed charges and expenses which plaintiff *would have earned had it not been for the fire.*

Petitioner contends that the average monthly profit for the *entire* first eight months established what would have been its probable experience during the suspension period, being the next three months.

The trial court held in accordance with petitioner's contention. The Circuit Court of Appeals reversed the trial court on the ground that, since petitioner's own experience showed that profits varied directly as did prices received, the profits made by petitioner while high prices for its product were prevailing did not establish that it would have made like profits during a period of much lower prices.

(b) Depreciation.

Petitioner's president testified on direct examination that petitioner had used the item of $3,034.99 as depreciation in its Proof of Loss because "we felt that that represented the true depreciation for the first eight months" [R. 208-209]. On cross-examination, however, both this witness and petitioner's auditor testified that the depreciation shown upon petitioner's books and used in their income tax returns, amounted to $23,079.59 for the eight months and that this figure was arrived at by taking into consideration the cost of acquisition of the plant and its equipment and the probable useful life thereof [R. 218, 273-274, 299-303].

The trial court adopted as the depreciation the figure of $3,034.99. The Circuit Court of Appeals held this to be error in view of the facts developed upon the cross-examination of petitioner's two witnesses.

(c) Proof of Loss and Appraisement.

Following the fire petitioner furnished respondents with a corrected Proof of Loss [R. 61-113]. Respondents served upon petitioner a notice of disagreement [R. 114-115]. Both the trial court and the Circuit Court of Appeals held that this notice was sufficient to put in issue the amount of the loss.

Respondents did not demand an appraisement. Both the trial court and the Circuit Court of Appeals held that its failure so to do did not *ipso facto* entitle petitioner to recover the full amount claimed in its Proof of Loss.

II.

Statement of the Case Contained in the Petition.

The statement of the case as contained in the petition is highly inaccurate in many particulars.

Petitioner states that respondents admitted during the course of the trial that the loss sustained under Item II of the policy [R. 13-14] was either $5,801.25 or $6,-198.20. This is not the fact. Respondents' witness, Maloney, testified that petitioner's books showed fixed charges and expenses continuing during the suspension period to be either of these sums. That is very different from an admission that the books were correct or that either of these sums constituted a loss under Item II of the policy. The policy provided that certain fixed charges and ex-

penses were recoverable but "only to the extent that they would have been earned had no fire occurred" [p. 2 of Petition; R. 13-14]. It is and always has been respondents' contention that even were petitioner's books correct, these fixed charges and expenses would not have been earned by petitioner even had no fire occurred, and that consequently they did not constitute a loss within the policy provisions. (*Goetz v. Hartford Fire Ins. Co.*, 193 Wis. 638, 215 N. W. 440, 441.)

Petitioner says the first question on appeal was: By what method petitioner's loss of profits should be computed? The actual question was whether under any reasonable method of computation the award of the trial court should be affirmed.

Petitioner says the second question on appeal was: Where a respondent fails to comply with the provisions of the policy with respect to making specific objections of the Proof of Loss, and in failing to request an appraisal, was amount of petitioner's loss fixed by petitioner's Proof of Loss? The actual question was whether the evidence was sufficient to support the decision of the trial court that respondents had not failed to comply with the requirements of the policy so as to debar itself from contesting the amount claimed in the Proof of Loss.

Petitioner says the third question on appeal was: To what extent depreciation should be considered in arriving at petitioner's loss? The actual question was whether the amount allowed by the trial court on account of depreciation was supported by the evidence.

III.
Questions Presented.

Under this heading in the petition, we find further inaccurate statements.

On page 5 of the petition the statement is repeated that respondent admitted that petitioner was entitled to either of two sums mentioned. As we have just shown, this is not a fact.

On the same page, petitioner says that the Circuit Court of Appeals singled out for consideration the production costs and sales prices for the last three months before the fire. That court did not "single out" these particular figures. In its opinion it sets forth the figures for the entire eight months of petitioner's operation before the fire and the prices prevailing during the succeeding three months, namely, the suspension period. Having done so to illustrate its decision, that court held that the profits made by petitioner before the break in the market were not determinative in estimating the profits it would have made after that break and during a period when the much lower prices caused by the break were still prevailing.

On page 5 petitioner says, that the Circuit Court of Appeals arbitrarily interfered with the amount of depreciation found by the trial court. This is not so. It held that testimony as to what "we felt" when preparing the proof of loss did not overcome the facts as developed on cross-examination of the same witness and of petitioner's own auditor and witness.

Again, the Circuit Court of Appeals did not "arbitrarily refuse to allow" depreciation as an item of fixed charges

and respondent has never agreed that depreciation is a recoverable fixed charge in this case. It has always been respondent's claim that where a plant has been destroyed by fire and restored by an insurance company, as was done in this case [R. 215], there is no depreciation during the time of such restoration. (*Fidelity-Phoenix Insurance Co. v. Benedict Coal Corporation* (C. C. A. 4), 64 Fed. (2d) 347, at p. 353.)

This is very much borne out by Petitioner's own books which show an average monthly depreciation as follows: Before the fire $2,284.95, after the fire $117.22 [R. 273-274].

Moreover, the Circuit Court of Appeals held that since petitioner never made any claim before the trial court that depreciation should be included in its fixed charges and expenses and, in fact, never made any such claim on appeal until its petition for rehearing, petitioner must be deemed to have waived this claim, even had the claim any validity.

IV.

Reasons Relied Upon by Petitioner for Allowance of Writ.

Petitioner states on pages 6-7 of its petition, that the Circuit Court of Appeals decided an important question of local law in conflict with the applicable local law. From the cases cited by petitioner, it apparently is referring to a question dealing with the Notice of Disagreement. In fact, that court decided no question of law whatever on this point, whether in conformity with local law or not.

It decided that the evidence supported the decision of the trial court that respondents' Notice of Disagreement with petitioner's proof of loss did, in fact, constitute a "disagreement in whole" with the amount claimed by petitioner and not a mere general denial of liability. This point will be considered more at length in reply to petitioner's brief in support of its petition.

Petitioner says, page 6, that the Circuit Court of Appeals interpreted the provisions of Item I of the policy contrary to the canons of interpretation that obtain in this State with respect to insurance policies. From the authorities cited by petitioner, this canon appears to be that an insurance policy should be construed against the insurer.

The Circuit Court of Appeals merely held that the evidence failed to show that petitioner by reason of the fire sustained a *loss of profits* amounting to $22,974.94 and which it otherwise would have made. It did not construe the policy, except to hold that the phrase "due consideration shall be given to the experience of the business before the fire and the probable experience thereafter," did not mean, under the facts of this case, that petitioner's average profits for the entire period of its operation before the fire was the controlling basis of estimating its probable experience during the suspension period. The facts referred to are that the greater part of such prior experience occurred during a period of high prices while the suspension period occurred during a period of low prices.

V.

The Notice of Disagreement.

(a) Good Faith.

Under Heading II of its brief on the petition, it is said, page 11, that when it filed its Notice of Disagreement, respondent was not sincere in its denial that petitioner sustained any loss under Item II of the policy. Petitioner intimates that, because of the audit it caused to be made of petitioner's books, respondent knew of petitioner's fixed charges and expenses. There are, at least, three answers to this contention. First: Before filing its Notice of Disagreement, respondents knew that, owing to the break in gasoline prices, petitioner could not have operated during the suspension period except at a loss and consequently would not have been earned its fixed charges and expenses. Second: The audit made by respondent did not take place until after the Notice of Disagreement had actually been given and until after the time for the giving thereof had expired. Third: Respondent is not bound by petitioner's books and, in fact, contended strenuously on the trial that they did not reflect the true fixed charges and expenses [R. 277-281, 285-299, 305-308, 334-336].

The Notice of Disagreement was given in perfect good faith and in conformity with respondents' consistently maintained position.

(b) Sufficiency.

Petitioner contends the Notice of Disagreement was insufficient.

The cardinal fallacy in petitioner's position on this point lies in its failure to distinguish between a mere

general denial of liability and a disagreement with the amount of loss claimed.

If an insurer upon receipt of a proof of loss merely denies liability upon the policy, it may be that it should be deemed to have admitted the amount of loss, if there was liability. Likewise, if an insurer merely disagrees with the amount of loss, it might be deemed to have admitted liability for such loss as was sustained.

Thus, if respondent had merely denied liability on the ground, for instance, that the fire was deliberately caused by the insured or was not on insured premises, then, on proof that the fire was not caused by the insured or was on insured premises, respondent might not have been in a position to deny the claimed amount of the loss. In the present case, however, respondent never has denied liability, that is, that its policy was applicable to the fire. It does, however, claim that, because of peculiar circumstances, that fire occasioned no loss covered by the policy. Its Notice of Disagreement was not a denial of liability but a notice that it disagreed in whole with the amount of loss claimed and that it admitted no loss in connection therewith. It waived any claim that the policy was not applicable to the fire. It definitely asserted its claim that the fire occasioned no loss covered by the policy.

Turning now to the provision headed, "Ascertainment of Amount of Loss" [R. 34], we find that this requires the company to notify the insured in writing of its partial or total disagreement with the amount of loss claimed by the insured. This the respondents did do, the notification reading [R. 114]:

> "You are hereby notified the undersigned totally disagrees with the amount of loss claimed by you in said Preliminary Proof of Loss . . ."

It is to be noted that neither in the petition nor the brief is any reference made to this part of the Notice of Disagreement.

The Notice of Disagreement given by the respondents fully complies with the requirement of the policy, further reading as it does [R. 114]:

> "You are hereby notified . . . the amount of loss which this company admits on each or all of the items described in said preliminary proof of loss is nothing.
>
> You are further notified that the undersigned does not admit that you suffered any loss on each or any of the different articles, or on each or any of the different properties set forth in said preliminary proof of loss."

We fail to see how any notification could have more clearly notified the assured that the amount of loss which respondents admitted on each of the different articles or properties was nothing and that it would not admit any loss on any of the different articles or properties.

In this connection we would call the court's attention to certain of the maxims of jurisprudence as set forth in the California Civil Code as follows: *Civil Code* 3528: "The law respects form less than substance." *Civil Code* 3532): "The law neither does nor requires idle acts." *Civil Code* 3542: "Interpretation must be reasonable."

We, therefore, submit that respondents have fully and completely complied with both the letter and the spirit of said policy provisions and that the petitioner was fully and clearly notified of the attitude of the company, namely, that it admitted no loss whatsoever coming under the terms of the policy.